No. 90

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,
Petitioners,

vs.

E. H. JOHNSON, Trustee in Bankruptcy of WILSON F. HENDERSON,
Respondent.

Certiorari to the Circuit Court of Appeals of the Seventh Circuit.

BRIEF FOR RESPONDENT.

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CITATIONS.

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BRIEF FOR RESPONDENT.

STATEMENT.

Counsel for petitioners precedes his statement of facts by setting forth two questions as presented under the record. We will agree that under counsel's assignment of errors he raises two questions, namely: that the District Court did not have jurisdiction, and that the District Court decided erroneously upon the merits. We are compelled, however, to take sharp issue with the questions as they are presented. The order of the District Court was based upon its finding of facts, including its interpretation of the rules of the Board of Trade, pursuant to which the Court took jurisdiction and considered and decided the merits of the claims made by the petitioners.

The jurisdictional questions now before the Court relate to and involve an interpretation of the rules of the Board of Trade and certain undisputed facts and circumstances involving largely the point of time. It is to be determined whether a Chicago Board of Trade member-

ship was property which came into the possession and control of the trustee in bankruptcy; and, even if not, whether the petitioners herein were in fact adverse claimants at the time of the institution of the bankruptcy proceedings. The question on the merits likewise involves a consideration of such rules with reference to the admitted facts.

The bankrupt, Wilson F. Henderson, held and owned a membership in his own right in the Board of Trade of the City of Chicago, one of the petitioners herein. The other petitioners are creditors of the corporation, known as Lipsey & Company, of which said bankrupt was president, and claim as such creditors to have a lien upon such membership superior to the rights of the trustee in bankruptcy. The Board of Trade itself does not claim any financial interest, lien or charge as against said membership, but only the right to enforce its rules under its own interpretation thereof. Its position is entirely different, therefore, from the other petitioners, but for convenience all will be referred to as "Petitioners" herein. The respondent in this proceeding, being the trustee in bankruptcy, will hereafter be referred to as "Trustee."

The said trustee in the course of the bankruptcy procedings filed his petition (Rec. 8) and subsequently an amendment and supplement thereto (Rec. 20). The prayer thereof was to require petitioners to show cause (Rec. 22), in substance why the trustee's right and title to said membership with power to sell free and clear of liens, should not be recognized and sustained.

After pleas to the jurisdiction were overruled, the petitioners filed their answers (Rec. 25, 30). There being no dispute of material facts, the matter was submitted to the Court by agreement upon such petition and answer and without evidence. The order of the District Court made a finding of facts. (Rec. 31.)

The statement of counsel for petitioners does not fully set forth the substance of all the rules of the Board of Trade which are involved, nor all of the facts. Furthermore, counsel presents as positive facts in the case, his own application of the rules to the facts. Since that is the very question for the Court, counsel's statement consists more of argument or presumption of facts than a statement of the ultimate facts before the Court. The only rules of the Board of Trade which are material are shown either in the trustee's petition or the answers of petitioners herein, in substance as follows:

Rule X, Sec. 1 (Rec. 9). This section provides how applications for membership shall be made and states that "any male person" may be admitted, upon election, "and upon payment of an initiation fee of $25,000, or on presentation of an unimpaired or unforfeited membership, duly transferred, and by signing an agreement to abide by the rules * * *."

Rule X, Sec. 2 (Rec. 9). "Every member shall be entitled to transfer his membership when he has paid all assessments due and has against him no outstanding unadjusted or unsettled claims or contracts held by members of this association, and said membership is not in any way impaired or forfeited, upon the payment of $250, to any person eligible to membership who may be approved for membership by the Board of Directors, after due notice by posting, as provided in Section 1 of this rule. The membership of a deceased member shall be transferable in like manner by his legal representative without the payment of the transfer fee. Prior to the transfer of any membership, application for such transfer shall be posted upon the bulletin of the Exchange for at least ten days when, if no objection is made, it shall be assumed the member has no outstanding claims against him * * *."

Rule XXII, Sec. 11 (Rec. 10). This rule provides that a corporation may do business on the board when two of its officers are members of the board, but that in case of default by the corporation such members "shall be subject to be disciplined in the same manner as they are subject to be disciplined for failure to comply with the terms of any business obligation of their own."

Rule IV, Secs. 7 *and* 9 (Rec. 26). These rules stipulate the various conditions pursuant to which a member may be suspended, and subsequently reinstated, as well as the conditions for expulsion.

Rule IV, Secs. 16 *and* 17 (Rec. 27). These provide that all charges for any default, misconduct or offense shall be in writing and signed and that no member shall be censured, suspended or expelled, except upon notice, and opportunity to be heard, and an examination of the charges by the Board of Directors.

There is no rule of the board providing for any certificate or other evidence of membership and no rule providing for the sale or other appropriation of a membership for the benefit of creditors against the will of the member.

The bankrupt had been a member of the Board of Trade for many years and also president of the corporation of Lipsey & Company, doing business on the board. In March, 1919, that company became insolvent and ceased doing business. Thereafter on May 1, 1919, said bankrupt posted notices of his application to transfer his membership in recognition of the requirements of the rules of the board and thereafter he did no business on the Board of Trade. Certain objections to a transfer were filed between May 1 and 10, 1919, but all of said objections so filed were withdrawn or disposed of not later than December, 1919. One of the objections filed

at that time but withdrawn was by Bridge & Leonard, who are petitioners herein.

On January 24, 1920, an involuntary petition in bankruptcy was filed against said Wilson F. Henderson. On that day, it is admitted, the bankrupt's membership was not in any way impaired or forfeited nor were any objections then on file based on any outstanding unadjusted or unsettled claims or contracts, or otherwise, and all assessments due thereon from him were paid. Such membership had a value at that time of approximately $10,500.

Five days later on January 29, 1920, objections to the transfer of the membership of said Henderson were filed with the Board of Trade by the petitioners, Armour Grain Company, George A. Hellman and James E. Bennett & Company, as creditors of Lipsey & Company. Subsequently Henderson was adjudged a bankrupt, the trustee was appointed, his petition instituting these proceedings was filed in June, 1920, and plea thereto to the jurisdiction of the court was heard and finally denied in May, 1921.

Thereafter on June 17, 1921, said Bridge & Leonard, also a corporation creditor, filed proceedings for the suspension of said Henderson. Thereupon the trustee filed an amendment and supplement to his petition and all petitioners herein filed their answers to the Trustee's petition as so amended. The Board of Trade claims no right, title, interest, or lien in, to, or against, said membership itself, but insists upon its right to protect its members and their claims under the guise of enforcing its rules; all other petitioners are creditors—not of the bankrupt—but of the corporation known as Lipsey & Company and do not claim any right to sell or enjoy the said membership or the proceeds thereof, but only insist upon their right at any time and despite the

bankruptcy to prevent any transfer of the members
or to institute proceedings for the suspension of
bankrupt.

The order of the District Court (Rec. 31) found
determined that the said membership of the bankr
in the said Board of Trade had passed to and come i
the custody and control of the Trustee in Bankrupt
that at the time of bankruptcy, the bankrupt had c
plied with all rules of the board so that on such
he had full right and power to transfer such members
free and clear of all claims, and that the Trustee t
and held such membership, free and clear of any clai
objections, liens, or otherwise. Claims of the sev
petitioners were, therefore, overruled and dismissed,
Board of Trade was ordered to recognize said Tru
as such owner for the purpose of sale only and to pe
such sale.

We particularly refer the Court to the record for
full text and findings of such order. That order is
before this court for its consideration by reason of
affirmance thereof by the Circuit Court of Appeals
the Seventh Circuit.

ARGUMENT.

Questions of jurisdiction.

With reference to the suggestion in the opinion of the Circuit Court of Appeals that the District Court had jurisdiction because the bankrupt was a resident of Florida, we concede that the record does not support this statement. He was a resident of Illinois at the time of the filing of the bankruptcy petition and voluntarily appeared and filed his schedules in the District Court for the Northern District of Illinois. Whether or not he may have subsequently become a resident of Florida and the effect thereof is immaterial, because the trustee herein does not rely on diversity of citizenship as a basis of jurisdiction; and as admitted by opposing counsel the Circuit Court of Appeals did not so rely.

The jurisdiction of the District Court over the proceedings here under review is fully sustained upon any one of three distinct grounds. *First,* the property in question was in the possession and control of the bankruptcy court and its trustee. *Second,* none of the petitioners were in fact such adverse claimants at the time of the institution of the bankruptcy proceedings as would entitle them to interpose objection to the jurisdiction of the District Court. *Third,* Sec. 70, Sub. e, of Bankruptcy Act expressly confers jurisdiction on the bankruptcy court, and that section is one of the exceptions named in Section 23b of the Bankruptcy Act. We shall discuss these propositions in that order.

First. The property in question was in the possession and control of the bankruptcy court and its trustee.

The jurisdiction of a District Court to deal with property of which it has actual or constructive possession by summary proceedings has been recognized over and over again, and this includes the right of the District Court to settle all adverse claims relating to such property. We do not deem it necessary to go over the facts of each case cited below but in the following cases it will be found that the courts have dealt with similar situations to the one at bar and have reviewed the questions of law here under consideration. The following cases fully justify the judgment of the District Court in the case upon the question of jurisdiction.

Whitney v. *Wenman*, 198 U. S. 539.
In re Hoey, 290 Fed. 116.
In re Gottlieb & Co., 245 Fed. 139.
Orinoco Iron Co. v. *Metzel*, 230 Fed. 40.
In re Wegman Piano Co., 228 Fed. 60.
O'Dell v. *Boyden*, 150 Fed. 731.
Collier on Bankruptcy, 12th Ed., Vol. 1, pp. 541-544.

If the proceedings under review constituted simply a controversy between the trustee and adverse claimants to property not in the possession of the trustee then a summary proceeding in the bankruptcy court without the consent of such claimants could not be prosecuted. The District Court would then have had no jurisdiction. Section 23b of the Bankruptcy Act is referred to as an exception to the general power of the District Court to cause the assets in bankruptcy to be collected, etc. That section is the sole basis for petitioner's attack upon the jurisdiction of the District Court to hear and determine the questions raised under the petition of the trustee in bankruptcy, but it relates primarily, at least, to the recovery of property, that is, to getting the property into

the hands of the trustee. There can be no question of the power of the District Court to administer property which is in fact in the possession of the trustee and to adjudicate all questions relating thereto.

The question for consideration relates to whether or not in legal contemplation the membership of the bankrupt in the Board of Trade came into the possession and control of the trustee. If the membership was in the possession and control of the bankrupt on the day when the petition in bankruptcy against him was filed, then upon principle and law it passed to the possession and custody of the trustee. The proposition that such a membership is property the title to which vests in the trustee will be conclusively sustained, *post,* but the fact will be assumed for the purpose of the immediate discussion.

We call the Court's attention to the fact that it is freely admitted that on the day when the bankruptcy proceedings were initiated, the bankrupt was an unquestioned member of the Board. We submit therefore that, being a member in good standing, the bankrupt had full title to the membership and all property interest therein; and it necessarily follows as a matter of law that he had possession thereof.

A membership in the Chicago Board of Trade is not under its present rules, represented by a certificate or other tangible evidence thereof, but this fact does not affect either the title or possession of the member. Such property is therefore purely intangible, which means that it can only be in constructive possession as distinguished from actual in the sense of physical possession. Title to property carries with it right of possession but that is not to be confused with constructive possession. The latter term is used and applies with reference to property which is not subject to manual delivery, hence

to actual possession. Right of possession exists as to any property, tangible or intangible, in favor of the person having title thereto.

The contention is made by opposing counsel that under Rule X, Section 1 of the Board of Trade rules no person can be a member unless accepted in accordance therewith by the Board, and therefore neither title nor possession of the bankrupt membership can pass to the trustee. Such a contention has been expressly overruled in *Board of Trade* v. *Weston*, 243 Fed. 332 under the authority of *Hyde* v. *Woods*, 94 U. S. 523 and *Page* v. *Edmunds*, 187 U. S. 596.

It was held in the *Weston case* just cited, that a Chicago Board of Trade membership is property under the Bankruptcy Act, but that the trustee took title thereto only for the purpose of sale. We call this Court's attention to the provision of the order of the District Court here under review (Rec. 31) wherein the right of the trustee was expressly limited to the power to sell. Such a limitation as a matter of law would be imposed even if not expressed in the Court's order. We quote from Collier on Bankruptcy (12th Ed., Vol. 2, p. 1112) with reference to the property rights of the trustee:

> "He takes an absolute title which, of course, carries with it the right of possession. He is vested with such title only for the purpose of administration and distribution of the estate among the bankrupt's creditors."

It is not necessary to rely upon principle or the like in support of the propostion that a membership in a Board of Trade passes to the custody and possession of the trustee. The question has been expressly passed upon in the case of *O'Dell* v. *Boyden*, 150 Fed 731 (C. C. A. 6th Cir.), and again in the very recent case of *In Re Hoey*, 290 Fed. 116. (C. C. A. 2d Cir.)

The question of jurisdiction was expressly raised in the *O'Dell case*, and the opinion of the Circuit Court of Appeals sustained the jurisdiction of the District Court because it was held that the possession of a membership in the New York Stock Exchange was in the Trustee. An examination of that opinion will disclose that the rules of the Exchange then being considered were strikingly similar to the rules of the Chicago Board of Trade. The plea of jurisdiction by O'Dell expressly denied the trustee's possession of the membership; and it was conceded that he was an adverse claimant in good faith of an equitable lien upon the membership at the time of the bankruptcy. The Court there said (p. 737):

> "The 'seat' or 'membership' continued to be the seat of Henrotin, and was a pecuniary asset which passed to his trustee. It was as much in his custody and possession as such a species of property is capable of. To deny the trustee's possession would be to deny the capability of possession of a chose in action or other incorporeal right or equity. The possession may be constructive, and not manual; but it is only because such property is not capable of a more tangible custody. Only through a court of equity can the pecuniary value of such an asset be realized to creditors or assignees. Only by decree in *personam* compelling the bankrupt member can such a transfer of membership be effectuated as will put the buyer in the place of Henrotin as a member. Over him for that purpose the bankrupt court has exclusive control, and in this sense, also, may it be said that the 'seat' or 'membership' was in *custodia legis* when the trustee sought the aid of the court to adjudicate the claims and liens asserted by O'Dell.

Counsel for petitioners devote considerable attention to this *O'Dell case* in an attempt to explain away and distinguish it from the case at bar. We submit that the Court's conclusions in that case cannot be avoided but are here directly in point upon the questions under con-

cussion. It is said of that case that the trustee's possession, if any, was because of the acquiescence of the Stock Exchange; again because the membership had been sold and the proceeds were in the possession of the Stock Exchange, therefore, it was a chose in action due from the Exchange; and again the distinction is recognized that it was an outside person and not the Exchange or its creditor members who was the adverse claimant.

The contentions of petitioners have no basis in any language used in the Court's opinion in the *O'Dell case.* The Court there primarily considered the question of whether the membership itself came into the possession and control of the trustee, hence within the jurisdiction of the Bankruptcy Court; and finding that it did, therefore held that the proceeds were likewise subject to administration, and all claims were subject to adjudication, in summary proceedings. All attempts to distinguish the *O'Dell case* will fail upon an examination of the opinion.

We find that the case of *O'Dell* v. *Boyden* has been very frequently accepted, cited and quoted with approval not only by numerous of the Federal courts but by such well known text book authorities on bankruptcy as Black, Collier, Loveland and Remington. Indeed we have failed to find after considerable search that the opinion of Judge Lurton in that case has ever been criticised, dissented from or even distinguished as an authority upon the question of jurisdiction therein involved. It was cited in *Board of Trade* v. *Weston,* 243 Fed. 332 (C. C. A. 7th Cir.) wherein a Chicago Board of Trade membership was held to be an asset in bankruptcy. It was not only cited but extensively quoted from by the Circuit Court of Appeals of the Second Circuit in the very recent case of *in re Hoey,* 290 Fed. 116 to which we call the Court's

particular attention. The opinion there rendered was solely upon the question of jurisdiction; the possession of a membership of the New York Stock Exchange was involved; and the Court after a review of numerous decisions of this Court, including those cited by us in this brief, sustained the jurisdiction of the District Court and affirmed the order thereof requiring claimants in the summary proceedings to present and adjudicate their claims against such membership.

Counsel for petitioners argues that the membership is not susceptible of ordinary sale; that the rules require that the Board post the membership for and sanction the transfer; and that the membership cannot be transferred except by or with consent of the Board. There is no basis for or merit in such contentions.

Section 2 of Rule X (Rec. 9) expressly gives a member the right to transfer his membership subject to conditions. The member, not the Board, posts the application for transfer. This right to transfer is a valuable element of the membership. If the rules are complied with, neither the Board nor any of its members can prevent a transfer by virtue of any provision of the rules. It is true that under Section 1 of Rule X (Rec. 9) no person can become a member unless accepted by the Board, but when accepted, he complies with the rules either by paying an initiation fee or by presenting an unimpaired or unforfeited membership, *duly transferred*. There is no rule of the Board which permits the Board to arbitrarily refuse to recognize a transfer of the membership from one who shall have complied with the provisions of Section 2, Rule X, to one who had been accepted under Section 1, Rule X. The provisions of Section 1 have no effect upon that quality or privilege which belongs to every membership under Section 2, namely, transferability. This transferability is what makes the membership in a legal

sense property as a part of the bankrupt estate; and possession is one element of property.

Counsel for petitioners deny that there can be constructive possession of the membership in question and cite in support of their position the case of *In Re Rathman,* 183 Fed. 913, to the effect that actual possession is necessary. An examination of that opinion, however, will disclose that the property involved in that case was in fact in the physical possession of the adverse claimant. The question being considered was upon the contention that the right of possession in the Trustee to the property, in fact gave him constructive possession. Such terms are not synonymous and it was only in this connection the Court held that actual possession was necessary.

Whether there be actual physical possession or constructive possession depend in each particular case upon the nature of the property involved. With title to property goes the right of possession which may result in either actual or constructive possession; but if an adverse party has actual possession there can of course be no constructive possession in the Trustee. In the case at bar the Trustee acquired constructive possession of the Board of Trade membership because the very nature of that property does not permit of a physical taking. The ownership and privilege of enjoyment of this membership was in the bankrupt at the time of bankruptcy and at that time no one else had or could have had any actual possession thereof.

Arguments that a membership of this character was not property such as to be an asset in bankruptcy have repeatedly been made and overruled by this Court. It is held that whatever onerous conditions there may be, as imposed by the rules, nevertheless the membership is property. We submit that the same

principles sustain the proposition that this property, even though of a peculiar intangible nature, nevertheless carries with it the inherent characteristic of possession which because of that intangible nature is constructive rather than physical. Under the facts of this case it can therefore be properly said that the trustee in bankruptcy took the actual constructive possession of the membership of the bankrupt in the Chicago Board of Trade.

Hyde v. *Woods*, 94 U. S. 525.
Page v. *Edmunds*, 187 U. S. 596.

Second. None of the petitioners were in fact such adverse claimants at the time of the institution of the bankruptcy proceedings as would entitle them to interpose objection to the jurisdiction of the District Court.

Even though it be conceded that the Trustee did not get possession of the membership of the bankrupt, that fact alone does not defeat the jurisdiction of the District Court as to the petitioner's herein. In order that they may sustain a plea to the jurisdiction it must conclusively appear not only that there are in fact adverse claimants having claims which are real and not colorable, but it must also appear that they were such claimants at the time of the filing of the bankruptcy proceedings. This has been the express holding of this Court, as well as a rule recognized in many cases.

Mueller v. *Nugent*, 184 U. S. 1.
Schweer v. *Brown*, 195 U. S. 171.
In re Bacon, 210 Fed. 129.
In re Ransford, 194 Fed. 658.
In re Davis, 119 Fed. 950.

Was the Board of Trade of the City of Chicago an adverse claimant having a real claim at the time of bankruptcy? The Board does not pretend to have any finan-

cial interest in or claim against such membership. The bankrupt's membership passed to and became the property of the trustee subject to the rules of the Board. How then could the Board be an adverse claimant at the time of the bankruptcy petition. Granting that a dispute as to the interpretation or application of the rules of the Board is a controversy in which the Board is adverse to the trustee, nevertheless, even if that makes the Board an adverse claimant, that controversy did not arise until after and in the course of the bankruptcy proceedings. The Board was making no adverse claims with regard to this membership and as against the bankrupt, either directly or indirectly, at the date of bankruptcy.

The bankrupt had acted absolutely in accordance with the rules of the Board with regard to the posting of an application for transfer and more than ten days had passed at the time of the filing of the bankruptcy petition. Under the very provision of Rule X, Sec. 2 (Rec. 9-10) it was then assumed that the member had no outstanding claims against him. In view of that assumption it is conclusive that the Board of Trade could not have had a claim against the bankrupt at that time.

All other petitioners were creditors of the corporation, Lipsey & Company, and not of the bankrupt individually. That corporation failed in March, 1919. Although the bankrupt posted his application for transfer on May 1, 1919, none of the petitioners herein, with one exception, had filed any objection to the transfer up to the time of bankruptcy, January 24, 1920. The one exception, Bridge & Leonard, had filed a claim but had withdrawn it. Despite the fact that the rules provided that there should be an assumption that there were no objections if notice thereof had not been given within ten days, these petitioners now before the Court permitted nearly

nine (9) months to pass (from May 1, 1919, to January 24, 1920) without action on their part. The petitioners other than Bridge & Leonard filed their objections five days after the bankruptcy petition. It is uncontroverted that on January 24, 1920, the date of the filing of the bankruptcy petition, the bankrupt was a member of the Chicago Board of Trade in good standing and, therefore, his membership was unimpaired in any respect and that no objection to a transfer was then on file.

The petitioner Bridge & Leonard not only had withdrawn the objection to transfer filed prior to the bankruptcy, but took no action of any kind until June, 1921. In the meantime, not only had the petition in bankruptcy been filed but the trustee on his appointment had filed his original petition herein asserting jurisdiction over the membership, and pleas to that jurisdiction had been overruled by the District Court in May, 1921 (Rec. 19). The filing of proceedings for suspension of the bankrupt by said Bridge & Leonard in June, 1921 necessitated the amended and supplemental petition herein. Under these circumstances can it be said that Bridge & Leonard was an adverse claimant on January 24, 1920?

We believe that Rule X, Sec. 2, (Rec. 8) might well be construed to mean that when an application for transfer is posted any objection thereto must be filed within ten days; but even though objections may be filed at any time prior to transfer it cannot be denied under that rule that there is an assumption that there are no claims after the expiration of ten days. On January 24, 1920, the bankrupt, being in good standing and without objections on file to his proposed transfer, had the absolute right under the rules of the Board to consummate a transfer at least if he could find a purchaser. Such purchaser could have taken an assignment of the bankrupt's membership on that day and the presentation thereof upon his election

would have been a full compliance with the requirement of Sec. 1 for a "presentation of an unimpaired or forfeited membership, duly transferred." The right of any member to file an objection more than ten days after the posting of notice, if such right exists, cannot be construed as anything more than a latent lien, which terminated when the title passed to the trustee.

The only right that creditors of a corporation may have is under Rule XXII, Sec. 11 (Rec. 10). Does this rule give to such creditors a right to file objections? It does not specifically so state, but only says that the officer members of such corporation "shall be subject to discipline." Discipline means a deprivation of privileges, and the rules provide for suspension or expulsion of a member. This we take it is discipline. Can the rule be construed to mean more than that? Such discipline can only be the result of charges made and a hearing thereon under Rule IV, Sec. 16 and 17 (Rec. 27). The bankrupt had lost all his privileges when his membership passed to the trustee.

In any event, none of these petitioners claim any right to take this membership or to use it or to sell it. They cannot require its sale by the bankrupt. The Board itself could not dispose thereof for their benefit. They cannot get out of this membership one single penny. On the date of bankruptcy they were not creditors of nor claimants against the bankrupt, but at the very most had only the right to file their charges or objections if they should see fit to do so. Their rights were purely latent in character, having no force until asserted. Surely on the date of bankruptcy they were not in fact adverse claimants.

Counsel devotes a great deal of space in his brief and cites many cases in his discussion of the distinction between "controversies in bankruptcy" and "proceedings

in bankruptcy." We do not deem this question in point, because under the very cases cited there must be not only a lack of possession of the property in the trustee but an adverse claim existing at the time of the bankruptcy proceedings, if the District Court is to be denied jurisdiction. We invite a close examination of all the cases cited by opposing counsel. He particularly relies on *First National Bank* v. *Title & Trust Company,* 198 U. S. 280, but in that case the bankrupt had placed property in a storage warehouse, taking warehouse receipts therefor and had thereupon pledged such receipts. The bankrupt therefore, did not have the actual possession and control of the property in question or of the evidences thereof; namely: the warehouse receipts. Counsel has not cited a single case wherein the jurisdiction of the Bankruptcy Court over property which was in the possession and control of its trustee has ever been denied.

We cannot pass unnoticed certain statements which are made in an attempt to sustain the proposition that the petitioners were adverse claimants. There is no basis for the statement that these petitioners claimed this membership as property. Under the record they neither claim to own it, control it, or have any affirmative lien thereon; but on the contrary, by their brief they deny that it is property. Neither is there any basis for the statements that the trustee is endeavoring to defeat a contract between the bankrupt and the Board of Trade, or defeat any rights in contravention of the charter or rules of the Board of Trade, or that such rules became inactive and are annulled by virtue of the order of the District Court. Neither has the District Court sustained any such contentions. On the contrary, the trustee by his petition and now in this Court asks only for the recognition of his ownership in this property subject to

and in strict accordance with the rules of the Board of Trade. Whatever dispute there may be in this case arises in the course of administration of the bankrupt estate with reference to an interpretation of the rules of the Board.

It is, therefore, submitted that under all of the facts and circumstances of this case, the petitioners are not in fact adverse claimants having any actual and valid claim against this membership and that in any event they were not such adverse claimants at the date of the filing of the bankruptcy petition herein.

Third: Sec. 70, Sub. e, of the Bankruptcy Act, expressly confers jurisdiction on the Bankruptcy Court, and that section is one of the exceptions named in Section 23 b of the Bankruptcy Act.

The petitioners deny the jurisdiction of the District Court under authority of Section 23 b of the Bankruptcy Act. It is asserted, and citations are presented in support thereof, that this section constitutes an exception to the general powers given in the Bankruptcy Act to cause the estates of the bankrupts to be collected and controversies in relation thereto determined; that under said Section 23 b it is necessary for the trustee to file proceedings in the court in which the bankrupt himself might have filed. In support thereof they particularly cite both *Bardes* v. *Hawarden Bank*, 178 U. S. 525 and *Babbitt* v. *Dutcher*, 216 U. S. 102. We call the Court's attention to the fact, however, that subsequent to the decisions of this Court in those cases, Sec. 23 b was amended so that suits for the recovery of property under Sec. 70, Sub. e, were expressly excepted from the requirement thereof. If Sec. 70 e applies to such a situation as is here before the Court, then the Bankruptcy Court did have jurisdiction of these proceedings because such section expressly provides therefor.

Weidhorn v. *Levy*, 253 U. S. 273.

On the date of filing of the bankruptcy petition the bankrupt was a member in good standing and was the owner of the membership in the Chicago Board of Trade. Not only was there no claim on file against him on that day, such as would constitute a lien on the membership or prevent its transfer, but the bankrupt had complied with Rule X, Sec. 2 (Rec. 9) of the Board pertaining to transfer and more than ten days prior thereto had posted a notice of his application for transfer. On that day the bankrupt had the absolute right to transfer, because under the rules themselves it was then to be assumed that there were no claims or objections to such transfer. If other members still had the right to file claims or objections they were in the nature of latent liens.

If on January 24, 1920, this bankrupt member by his own act had made a transfer of his membership, that transfer would have been conclusive. In contemplation of law this bankrupt member did make a transfer of his membership as of the date of the filing of the bankruptcy petition against him. The trustee in bankruptcy took the membership by operation of law. These petitioners had failed to take advantage of those rules of the Board which gave them a right theretofore to perfect their claims against this membership. The bankrupt could have avoided anything which they may have attempted to do subsequent to a transfer by him.

The trustee in bankruptcy takes the membership as property subject to the rules of the Board, but also with the advantage of all the privileges and rights which the bankrupt had pursuant to the rules. The trustee, therefore, had the right under Sec. 70 e to take action for the purpose of avoiding the attempts of the petitioners to fasten a lien of the membership subsequent to the transfer to him. This right in and of itself we submit gave the District Court jurisdiction.

We submit that the Bankruptcy Court had jurisdiction of the petition of the trustee now before the Court, both as to the subject matter thereof and as to the petitioners now before the Court, and that such jurisdiction is conclusively apparent from a consideration of the provisions of the Bankruptcy Act itself, and under the facts of this case. The membership is in the possession and control of the trustee; the petitioners are not adverse claimants upon claims which were adverse at the time of the institution of bankruptcy proceedings; and these attempts by petitioners to fix liens upon this membership subsequent to the bankruptcy is contrary to the rules of the Board itself and can be avoided by the trustee.

THE MERITS.

The merits of this case involve a determination of the question whether the trustee took this membership of the bankrupt in the Chicago Board of Trade as an asset of the estate; and if so, whether under the rules of the Board and the conditions imposed thereby, the trustee takes the membership free and clear of any claims. Opposing counsel is entirely in error when he says that the decisions of the Circuit Court of Appeals, and the District Court, were made in disregard of all rules of the Board, and contrary to the decisions of this Court. On the other hand, both of the lower courts acted under the authority of the several opinions of this Court establishing the law applicable hereto, and gave full consideration to those rules.

The claims of the petitioners were overruled not in disregard of the rules, but because upon a consideration and interpretation of those rules, it was determined that the bankrupt had so complied therewith, that on the day

of the filing of the bankruptcy petition he had the absolute right to transfer his membership free and clear of any claims whatsoever. It was held as a necessary consequence therefore, that the membership passed to the trustee with all the rights, privileges and advantages as to transfer which the bankrupt himself possessed.

Under Section 70 of the Bankruptcy Act all property which the bankrupt might have transferred is declared to vest in the trustee, and therefore, it becomes an asset of the bankruptcy estate. It makes no difference what the condition or value of such property may be; the only criterion is its transferability. The fact that the property could not be taken by judicial process in the state of its situs is wholly immaterial; so likewise the fact that its transfer by the bankrupt is subject to extremely onerous conditions. If a transfer can be effected by the bankrupt under any conditions the requirements of the Bankruptcy Act are satisfied; the conditions only affect the value of the asset.

In the case of such associations as stock or grain exchanges it is usual that conditions are imposed both upon becoming a member and also upon transferring a membership. Nevertheless the right of transfer in some manner is generally recognized by such association. The Board of Trade of the City of Chicago by its rules gives to members the affirmative right to transfer membership subject only to the conditions prescribed. A membership in that Board of Trade has heretofore been held as property vesting as an asset of the bankrupt estate.

Board of Trade v. *Weston*, 243 Fed. 332. (C. C. A. 7th Cir.)

There has been no material changes in the rules of the Board since that case as will appear from a comparison of the record here and that opinion. The use of certifi-

cates as an evidence of the membership has been discontinued but this can in no way affect the qualities of the membership as to transferability or otherwise. The membership of the bankrupt Wilson F. Henderson was and is property, the title to which has vested in his trustee. That title was transferred by operation of law and is an asset in this bankruptcy estate regardless of the conditions which affect its value.

Page v. *Edmunds*, 187 U. S. 596.
Hyde v. *Woods*, 94 U. S. 523.
In re Hoey, 290 Fed. 116.
In re Stringer, 253 Fed. 352.
O'Dell v. *Boyden*, 150 Fed. 731.
In re Hurlbutt Hatch & Co., 135 Fed. 504.
In re Gaylord, 111 Fed. 717.

See also:

Rogers v. *Hennepin County*, 240 U. S. 184.
Citizens Nat. Bk. (Anderson) v. *Durr*, 257 U. S. 99.

In support of the proposition that a membership is not an asset counsel has referred to the cases of *Bartley* v. *Smith*, 107 Ill. 349, and *People* v. *Board of Trade*, 80 Ill. 134. An examination of those cases will satisfy that they have no bearing on the question at issue. It is not held by the Illinois Supreme Court that such a membership is not property but that it is not property subject to judicial process under the statutes of Illinois. There is a vital distinction which that Court has recognized in *Weaver* v. *Fisher*, 110 Ill. 146.

The question in any event is not one of statutory interpretation but a definition of property and the Federal Courts are not bound by the Illinois decisions.

Page v. *Edmunds*, 187 U. S. 601.
In re Page, 107 Fed. 89.

The law recognizes two distinct rights accruing to a member in such an association; one the right to do business on the exchange, and this is personal; the other the property right, which passes to and vests in the trustee. When the trustee sells, the buyer must be accepted by the Board; but whether the trustee can find such a buyer does not affect his right to sell the membership as property. Before the membership, as property, and the money value thereof can be wholly lost to the trustee express provision in the rules for any such forfeiture must be found.

In re Gaylord, 111 Fed. 717.

The question of whether the membership has great or little value is not material. The trustee takes title to all property with the right to reject the worthless.

Sessions v. *Romadka*, 145 U. S. 29.
Board of Trade v. *Weston*, 243 Fed. 332.
In re Frazin v. *Oppenheim*, 174 Fed. 713.

A species of property which emphasizes the rights of a trustee here under discussion is the ordinary form of lease. Such an instrument involves an obligation which may entirely wipe out any possible value to the lessee; but on the other hand, it is property and may have great value. Furthermore, it is usual for a lease to contain a covenant prohibiting the lessee from subletting or assigning. Nevertheless, it is held that such covenant alone will not prevent the lessee's title to such lease from vesting in the trustee, and that such vesting will not constitute a violation of the lease.

Gazlay v. *Williams*, 210 U. S. 41.
In re Frazin v. *Oppenheim*, 174 Fed. 713.
In re Adams, 134 Fed. 142.

So also the stipulation in a contract against an assignment thereof has been recognized as not preventing an assignment by operation of law; it is at the option of the trustee whether or not he will accept and perform.

Central Trust Co. v. *Chicago Auditorium Asso.* 240 U. S. 581.

It cannot be ascertained until the trustee offers the membership for sale whether or not it can be sold. It is immaterial what claims or contingencies there may be affecting the property or its value. It is for the trustee or parties in interest with him to determine what shall be done. It does not lie in the mouth of lienholders to demand the property or deny the equity of a trustee therein because such property or the equity seem of no value. That involves the wisdom of the trustee's actions and not his right or title in and to the property.

Counsel for petitioners in his argument upon this question and indeed throughout his brief predicate their position upon one statement for which there is no foundation in the rules of the Board. It is repeatedly stated by counsel that a membership cannot be transferred unless the creditors of the members consent, and that the Board of Directors is powerless to permit a transfer. There is absolutely no requirement for a consent; neither has the Board of Directors anything to do with a transfer unless it be when an objection thereto is filed. The rules relating to transfers are Sections 1 and 2, Rule X (Rec. 8).

When an application for transfer of a membership is posted upon the Bulletin of the exchange by a member, objections to such transfer may be made. That requirement is very far from requiring the consent of creditors. On the contrary if the notice is posted for at least ten days and no protests are made the rules provide "it shall be assumed the member has no outstanding claims

against him," and the member would be then free to transfer without regard to what claims might be outstanding against him.

While it is true that Rule X, Section 2, requires transfer to one eligible to membership under Section 1, this does not affect the rights of the trustee to take this kind of property. He takes only subject to the rules for the purpose of sale and not as an ordinary member.

It will be found that similar conditions as to transfer existed in all those cases cited above to the effect that such a membership is property.

We do not dispute the proposition that the trustee takes the membership of the bankrupt as property subject to all of the rules of the Board of Trade. The petition in this case expressly prays only that the trustee's rights shall be recognized under the rules of the Board, and the order of the Court here under review expressly recognizes such rules. The statement of counsel that the District Court held that as soon as the bankruptcy proceedings were instituted all of the rules of the Board of Trade became inoperative is entirely without foundation.

It is true that there was submitted for consideration to the District Court the interpretation or application of certain of those rules; but the claim made in behalf of the trustee that he has taken and holds this membership free and clear of any claims or liens of the petitioners or others is based upon the contention that such parties have no right as against the trustee under a proper interpretation of their own rules.

It is a familiar principle for which authority is hardly necessary that an instrument is always to be construed case of doubt as against the maker thereof. The rules of the Board of Trade while recognized and respected by the Bankruptcy Court will certainly not be so con-

strued as to take away all value from the property held by the trustee, unless such rules unquestionably require that course.

Rule X, Section 2, (Rec. 9), expressly gives to a member the absolute right to transfer his membership to any person eligible for membership. This is an affirmative privilege in favor of a member even though there are conditions to be complied with. Counsel for petitioners has repeatedly here suggested that there is a contract between the bankrupt member and the Board of Trade, which has been violated and disregarded by the order of the District Court, under which contract there were certain obligations on the part of such member which Henderson has failed to comply with. Counsel, however, wholly ignores the fact that a contract is mutual and that the member has privileges as well as obligations. That privilege with which we are concerned deals with his right to sell and transfer his membership.

If he complies with the conditions imposed by the rules then there is no limitation and no power on the part of the Board under its rules to prevent his making a sale and transfer. We call to the attention of the Court that the conditions of becoming a member are contained in Section 1 of Rule X, (Rec. 9), whereas the privilege of selling the membership is in a distinct section, namely, Section 2 of Rule X, (Rec. 9). The two sections are not made interdependent. It is true that Section 2 requires the transfer to one eligible for membership and who may be accepted as provided by Section 1. It is also true that Section 1 contemplates an accepted applicant presenting a membership which has been *duly transferred* from a member.

We would ask the Court to examine these two sections with reference to these conditions. It will be observed that Section 1 provides for the making of an application

for membership, an examination of the applicant and his election by the Board of Directors. When those things have been done and the applicant has been duly elected he consummates the transaction aside from signing an agreement to abide with the rules of the Board, in one of two ways, namely, by paying an initiation fee as prescribed, or "by the presentation of an unimpaired or unforfeited membership, duly transferred." In other words, this section expressly contemplates that a membership presented by such applicant should be "duly transferred." It of course cannot be so transferred unless the former member had the power to make such transfer; in other words, he must have complied with the rules respecting transfer.

Section 2 of Rule X, (Rec. 9), gives the right of transfer subject to conditions among which is the following: that a member shall have against him "no outstanding, unadjusted or unsettled claims or contracts held by members of this Association, and said membership is not in any way impaired or forfeited." This section, however, provides how the existence of any such claims, etc., may be determined. The rule says "Prior to the transfer of any membership, application for such transfer shall be posted upon the bulletin of the exchange for at least ten days, when if no objection is made, *it shall be assumed the member has no outstanding claims against him.*"

The language of this Section 2 cannot be read to require that a member desiring to dispose of a membership must first find one who has been approved and accepted for membership. On the contrary, the rule says that every member shall be entitled to transfer to any person eligible to membership. The fact is therefore that a member proceeds to post his application for transfer upon the bulletin of the exchange when he desires

to sell. When he finds a qualified purchaser he makes the sale, assuming that no objections have been filed as result of his notice of application. The other members are given ten days to make objection, but after that time if there are none on file, the member is free to make the transfer at any time.

Whether or not Section 2 of Rule X shall be read to mean that members shall have only ten days to file their objections or whether the members may file their objections at any time prior to the transfer is immaterial in this case. We believe the former interpretation would be proper, but it is not necessary to the determination of this case. If ten days have actually passed and no objections are on file then in the language of the rule, "It shall be assumed" that there is no objection, and the member is therefore free to make the transfer on any day that he can find a purchaser, at least, so long as there are no objections.

From this standpoint we call attention to the facts in this case. The bankrupt was a member of the Board of Trade and filed notice of his application for transfer on May 1, 1919. Within ten days certain objections were filed, but all of such objections were disposed of and withdrawn not later than December, 1919. On the 24th day of January, 1920, the bankrupt was still a member and on that day, as is admitted by the petitioners, he was in good standing upon said Board. In other words, on that day there were no objections on file to prevent a transfer by him.

It would have been entirely proper therefore for Wilson F. Henderson to have sold, assigned and transferred his membership on January 24, 1920; and any person who had been accepted as a member would have been acting in full compliance with the rules of the Board if he had presented proof that the membership of Wilson F. Henderson had been duly transferred to him.

On the day in question, January 24, 1920, an involuntary petition was filed against the said member, Wilson F. Henderson and the question now before the Court is to determine what title the trustee took. It is the contention of the trustee that he took all that the bankrupt could have then conveyed, and that inasmuch as the bankrupt had complied with the rules so as to enable him to transfer his membership free and clear of any claims or liens whatsoever, therefore the trustee has taken such membership as a transfer by operation of law, free and clear of any and all claims or liens.

It is a familiar rule that the rights of the trustee date from the filing of the petition in bankruptcy. From that date the case is *lis pendens* and all property of the bankrupt which was in his possession is therefore in *cusdodia legis*. In the case of *Mueller* v. *Nugent*, 184 U. S. 1, this Court held:

> "It is as true of the present law as it was that of 1867, that the filing of the petition is a caveat to all the world and in effect an attachment and injunction (*International Bank* v. *Sherman*, 101 U. S. 407, 25 L. Ed. 867) and on adjudication, title to the bankrupt's property became vested in the trustee (Sections 70, 21c) with actual or constructive possession and placed in the custody of the Bankruptcy Court."

The opinion in that case discusses the proposition at some length and has been followed in numerous cases since that time.

Acme Harvester Co. v. *Bergman Lbr. Co.*, 222 U. S. 300.

Weinger Bergman & Co., 126 Fed. 875.

Upon the question herein involved as to whether or not the trustee took the membership free and clear of claims, we quote the opinion in *Page* v. *Edmunds*, 187

U. S. 596 in which the status of such a membership
property was reaffirmed. The Court there stated:

> "The trustee of the bankrupt's estate is the ba
> rupt's assignee and we only repeat the statute wh
> we say that the trustee is vested with whatever t
> bankrupt could have conveyed."

The case of *In re Hurlbutt, Hatch Co.*, 135 Fed. 5
was also a case which involved a membership on the sto
exchange and the Court there stated upon this questio

> "There is no merit in the contention that the
> der to execute said request was equivalent to a
> signation of said personal membership in the sto
> exchange. The bankrupt lost his membership wh
> the essential element thereof—the seat in the sto
> exchange—vested in the trustee. He was 'fully a
> completely divested of his property in the seat
> membership.' *Platt* v. *Jones*, 96 N. Y. 24. The ord
> of Court merely effectuates the provision empow
> ing it to cause the estates of bankrupts to be c
> lected, by requiring this bankrupt to obey the p
> visions for the execution of the papers necessa
> for such purpose."

The law upon this question was reviewed in the case
Bailey v. *Baker Ice Machine Company*, 239 U. S. 2
when the Court said:

> "When not otherwise specially provided t
> rights, remedies and powers of the trustee are
> termined with reference to the conditions existi
> when the petition is filed. It is then that the ba
> ruptcy proceeding is initiated, and the hands of t
> bankrupt and his creditors are stayed, and that
> estate passes actually or potentially into the co
> trol of the bankruptcy court."

It is therefore apparent that the membership of t
bankrupt passed to the trustee and vested in him
operation of the law. This was a legal transfer and t
trustee took all that the bankrupt could have convey

with all of the privileges which inured to him as a member under the rules of the Board. While the trustee takes subject to the rules, if the bankrupt has complied with the conditions imposed by the rules there is certainly no obligation that the trustee shall again comply with those same rules. It has not been asserted that the trustee must post notice nor will it be. The bankrupt did that once, and that is enough. All creditors had an opporunity to come in and file their objection and not having done so they cannot now complain if the bankrupt has made a transfer by his own act or the membership has been transferred by operation of law.

The rights of the trustee are not alone, however the rights which the bankrupt had and which passed by operation of law from him. Section 47 a-2 of the Bankruptcy Act as amended in 1910 gives certain additional rights. That section relates not to what property passes to the trustee (Section 70 determines that), but rather to the powers or rights to be exercised and enjoyed by the trustee over the property of the bankrupt. That portion of Section 47 a-2 here in point is as follows:

> "And such trustee, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

The object of this part of the Act quite apparently was to overcome the effect of unrecorded liens which without said provision would be good against the bankrupt and hence would be good against the trustee. It is, therefore, now recognized that a trustee has two rights

as to property in his custody, the rights of the bankrupt and of a creditor holding some lien.

In re Seward Dredging Co., 242 Fed. 225.

The application of this section to the case at bar is clear. Under Rule X, Section 2 of the Board rules, creditors or claimants might file their protests against a transfer, but if ten days passed after notice without protests then "it shall be assumed" that there are none. The member had given the notice and on the date of the filing of the bankruptcy petition almost nine months afterward no protests were on file. Section 47 a-2 applies as of the date of the petition.

Bailey v. *Baker Ice Machine Co.*, 239 U. S. 268.

Fairbanks Shovel Co. v. *Wills*, 240 U. S. 642.

These creditors of Lipsey & Co., even granting they had the right to file protests, were under obligation to file them in due course. They knew that if protests were not filed within ten days the member could sell, but they did not file for nearly nine months nor until after the petition in bankruptcy was filed. At most they had, at that time, latent liens. It would seem that Section 47 a-2 was designed for exactly such a condition. Many cases construing that section seem clearly applicable.

Fuller v. *Atlanta Nat. Bank*, 254 Fed. 278.

In re Collins, 235 Fed. 937, 942.

Mass B. & Ins. Co. v. *Kemper*, 220 Fed. 847, 851.

In re Rosenthal, 238 Fed. 597.

In re Social Circle Cotton Mills, 213 Fed. 994.

In re Smith, 198 Fed. 876.

The trustee's rights exist as of the date of the bankruptcy petition January 24, 1920, and those rights are those of a lien holder, inasmuch as the property vested in and came into the possession of the trustee as of that day. Whatever potential claims or liens might be outstanding which had not been perfected by the filing of protests following the posting of Henderson's application for transfer became void as against the trustee. Whether the trustee takes the title of the bankrupt with the privileges and rights of the bankrupt existing as of January 24, 1920, or whether he takes as a lien creditor as of that date, makes little difference in the ultimate result in this case.

The rules of the Board having been complied with, to permit a transfer of the membership, and all creditors or potential claimants having been given sufficient opportunity to file their protests, and the member whose membership was proposed to be sold being in good standing without protests against his transfer of membership on the date of bankruptcy, therefore the title in and to this membership is good in the trustee free and clear of any claims whatsoever.

The petitioners in this case who filed protests on January 29, 1920, against the transfer of the bankrupt's membership were creditors of Lipsey & Co., a corporation, but not of the bankrupt personally. They therefore depend for their rights upon the provisions of Section 11 of Rule XXII of the Board. (Rec. 10.) Under this rule it is provided that where a corporation defaults in its obligations, the officers thereof who are members of the Board shall be subject to be disciplined. Provisions for any such discipline are found in Sections 7, 9, 16, 17 of Rule IV (Rec. 26-27) involving either suspension or expulsion.

The right of these petitioners directly to prevent a transfer, if there was any such right, must be found in Section 2, Rule X, (Rec. 9) but that rule denies the right of a transfer only under either one of two conditions: One, that a member has outstanding, unadjusted or unsettled claims of contracts, held by members; second, that his membership is impaired or forfeited. There is no pretense that the petitioners, Armour Grain Company, George A. Hellman or J. E. Bennett & Co. had instituted proceedings for the suspension or expulsion of the bankrupt, or that any proceedings are contemplated upon their protests under the provisions of Sections 16 and 17 of Rule IV. Such parties have merely filed protests on the basis of unsettled claims or contracts against Lipsey & Co. It is argued by opposing counsel that this is in accordance with the practice of the Board. While we do not deny but that the membership as property is subject to the rules of the Board nevertheless there must be express provisions in the rules to justify such an impairment thereof as would take all value therefrom.

In re Gaylord, 111 Fed. 717.

It is a familiar rule referred to above that an instrument of any kind in case of doubt is to be construed most strongly against the person who prepared it and this principle certainly applies here. As between the trustee and the petitioners the rules of the Board are to be strictly construed. Those rules (Sec. 2, Rule X; Rec. 9) have made a distinction in regard to transfers of membership between outstanding claims and an impairment or forfeiture. The bankruptcy court will observe the same distinction, and will not recognize the provisions of Section 11, Rule XXII, (Rec. 10) involving corporations as giving any greater rights than are clearly expressed therein. Corporation creditors may

have the officers of such corporation disciplined in a proper case, but there is no basis in the rules for making the claims against the corporation personal obligations of such officer.

Long after filing of the trustee's original petition in the District Court the petitioner, Bridge & Leonard filed proceedings for the suspension or expulsion of Henderson. But this petitioner, likewise a creditor of Lipsey & Co., filed a protest against the transfer of the membership within ten days after notice for transfer was posted on May 1, 1919. They thereby recognized the requirement of the rules. Afterward, and before bankruptcy, they withdrew the protest, as they had a right to do, thereby giving to the bankrupt the unquestioned right to make a transfer in disregard of any claim they might have. We cannot conceive what right under the rule of the Board or in law or in equity will justify reviving their claim, and in another form, a year and a half after bankruptcy proceedings were instituted, and a year after the trustee's petition was filed. The trustee's right and title have intervened and the bankrupt has ceased to be a member. (See argument and citations above.) He is no longer subject to discipline, the transfer of membership to the trustee carrying with it the termination of all such provisions under the circumstances of this case.

Counsel for petitioners in his argument on the merits insists that the lower court erred in three respects. We shall refer to these briefly in the order presented.

First, it is said that the Court held that the right of the Board of Trade to suspend a member or refuse to transfer a membership ceased upon the appointment of a trustee in bankruptcy. Neither the District or Circuit Courts so held. On the contrary it was determined and held that under the rules of the Board the bank-

rupt had the right to transfer his membership free and clear of all claims, since these petitioners after due notice had failed to object thereto. This transfer was made to the trustee under those conditions and therefore the petitioners had lost all rights as against the trustee.

Counsel's argument on the proposition is that the title to the membership did not pass to the trustee but only a right to elect whether to take or not. The case of *Sparhawk* v. *Yerkes,* 142 U. S. 1 cited in support of such position does not sustain it. Counsel is not able to cite a single case which does sustain this contention. We have herein above cited several cases to the effect that title to all the bankrupt's property passes to the trustee subject to his right to reject the worthless or burdensome. Even if election were necessary it is quite apparent that the trustee in this case has elected to take this membership.

Counsel's second proposition is that the membership is not an asset in bankruptcy. No authority is presented other than the argument that the petitioners claims prevent a transfer and the amount of those claims exceed the saleable value. The value of a thing does not determine whether it is an asset. We are confident that under the authorities and reasoning hereinabove presented, there can be no question but that the membership of the bankrupt in the Chicago Board of Trade passed to and became an asset of the bankrupt estate.

The third proposition presented is in substance that there is no absolute right in a member to transfer his membership but that the transfer is made by the board of directors. Council's statements of what is in the rules of the board are not accurate in many instances. He refers to Rule X Sec. 1 and quotes from Section 2, Rule X as though it were a part of said Section 1; but

as to exactly the provisions of those sections we refer to the record. (Rec. 9.) The real dispute in this case as between the parties before the Court arises from the desire of petitioners to interpret and apply the rules of the Board of Trade solely for the benefit of members of the Board to the total exclusion of the rights of the trustee in bankruptcy. We have discussed those rules and leave to the Court their proper interpretation.

This case is now before this Court because of the granting of a petition for certiorari. That petition averred that the order of the District Court under the facts before the Court, and the opinion of the Circuit Court of Appeals, were in direct conflict with the law as established by certain decisions of this Court. Unfortunately, counsel for respondent were not admitted to practice in the Supreme Court at that time and hence could not take issue with such averrments. We are confident that upon a full examination of those decisions as herein discussed, it will become clearly apparent that the writ was inadvertently issued and the petition might properly have been dismissed. Counsel for respondent are content however that the case be decided upon the merits.

In conclusion, we submit to this Court that the membership of the bankrupt in the Board of Trade of the City of Chicago is property subject to the jurisdiction of the Bankruptcy Court as an asset of the bankrupt estate; that such membership is in the possession of the trustee and the bankruptcy court had full power to adjudicate and by its order did settle all questions and conflicting claims relating thereto; that the membership is not and never has been in the possession of any of the petitioners herein and further, that none of the petitioners had adverse claims against said membership on the date of the bankruptcy petition. Therefore, it con-

clusively follows that the District Court had jurisdiction of the trustee's petition in this case. We further submit that the trustee's title to the property in question, under the circumstances of this case and the law applicable thereto, is not subject to any claims or liens in favor of any of the petitioners herein. The order of the District Court is therefore proper and must be affirmed.

Respectfully submitted,

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